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No. 85-2096

In the Supreme Court of the United States

OCTOBER TERM, 1986

HENRY J. KRUEGER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied a fair trial on the ground that a portion of his urine specimen, which was subjected to a standard laboratory urinalysis prior to trial, was inadvertently destroyed.

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OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 3a) is reported at 22 M.J. 210. The opinion of the Air Force Court of Military Review (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals (Pet. App. 3a) was entered on April 25, 1986. The petition for a writ of certiorari was filed on June 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Following a special court-martial, petitioner was convicted of wrongful use of marijuana, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10

U.S.C. 934 (R. 186). He was sentenced to 45 days' confinement and a bad conduct discharge (R. 195). The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 1a-2a). Upon discretionary review, the Court of Military Appeals summarily affirmed (Pet. App. 3a).

1. On August 11, 1983, petitioner and the other members of his military unit provided urine samples at Holloman Air Force Base in New Mexico as part of a drug testing program (R. 110-114, 178). Portions of petitioner's sample were tested by four different methods; each test was positive for marijuana (R. 64, 68-70).

Under the standard urinalysis testing procedure, which was followed in this case, the servicemember who is tested provides a sample of urine at his duty station, and a bottle containing that sample is forwarded to the Brooks Air Force Base Drug Abuse Detection Laboratory for testing (R. 50, 51, 125-128). At the laboratory, portions of the original sample are poured for testing. If the initial screening and confirmation tests are positive for narcotics, the original sample is retained for 60 days (R. 53, 58, 85).

In this case, the analysis of petitioner's urine sample revealed the presence of marijuana metabolite on August 22, 1983 (PX 3), and officials at Holloman Air Force Base directed the Brooks laboratory to retain petitioner's urine sample pending court-martial proceedings (PXs 2, 3; R. 65-66). On September 27, 1983, a portion was poured from the source sample and taken to the Brooks Toxicology Section for further testing (R. 82). That test was also positive for marijuana (R. 70). The remainder of that portion of the sample was kept in the Toxicology Section safe (R. 83).

In late September 1983, petitioner requested access to his urine sample so that an independent test could be performed at the government's expense (AX 9). On November

8, 1983, the government asked petitioner's counsel to provide the information necessary for the sample to be sent to a civilian laboratory for testing. However, the defense did not provide the government with the requested information until early 1984 (R. 92-93).

By November 22, 1983, the government determined that petitioner's original urine sample had been inadvertently destroyed at some time after September 27, 1983.[1] Only the portion of the sample that had been analyzed at the Brooks Toxicology Section was still in existence (R. 55-56). The government notified petitioner's counsel that the remainder of that portion would be sent to an independent civilian laboratory at the University of Utah for further testing, and that the sample would be consumed by the test. Defense counsel did not object to that procedure. The remainder of the sample was sent to the University of Utah on November 28, 1983, and it tested positive for marijuana on December 5, 1983. See R. 145-146. The following day, petitioner's counsel informed the government that he "never formally objected [to]" and "never formally approved" the government's proposal to send the remaining portion of petitioner's urine sample to the University of Utah for retesting (AX 18).

During January 1984, the government became aware that approximately one milliliter of petitioner's urine sample remained in existence at the Brooks laboratory (AX 22). The defense then asked that the remaining portion of the sample be sent to the Schoenfeld Clinical Laboratory for analysis. The sample was provided to the Schoenfeld

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[1]The person responsible for retaining urine samples at the Brooks laboratory testified that only seven or eight samples had been inadvertently destroyed between April 1983 and March 1984, even though the laboratory had analyzed approximately 22,000 urine samples per month during that period (R. 59).

Laboratory. Because of the small volume of the sample, however, no analysis was possible (AX 9).

2. During a preliminary hearing, petitioner moved to dismiss the specification, on the ground that the government's failure to preserve his urine sample for an independent analysis violated his right to due process. The gravamen of petitioner's argument was that additional analysis was necessary to verify the results of the prior tests.

The trial judge denied the motion, and made the following findings of fact (R. 97-98): (1) the defense made a timely request for an independent analysis of petitioner's urine sample; (2) the government immediately asked the Drug Abuse Detection Laboratory at Brooks to preserve the urine specimen; (3) the Brooks laboratory knew that the specimen should be preserved; (4) the specimen was inadvertently destroyed on an unknown date by an unknown person; (5) the government made a good faith effort to comply with the defense request for an independent retest by sending the remaining specimen of petitioner's urine to the laboratory at the University of Utah; (6) the University of Utah laboratory was an independent laboratory; and (7) there was no reasonable basis for concluding that an independent analysis by the Schoenfeld Laboratory would have resulted in favorable defense evidence.

3. The Court of Military Review summarily rejected petitioner's claim that the urinalysis results should have been suppressed (Pet. App. 1a-2a). Relying on this Court's decision in *California* v. *Trombetta*, 467 U.S. 479 (1984), the Court of Military Appeals summarily affirmed (Pet. App. 3a).

ARGUMENT

Petitioner contends that he was denied a fair trial because the government inadvertently destroyed the bulk of his urine sample. That fact-bound claim was correctly rejected by the courts below and does not warrant further review.

To begin with, there was no destruction of exculpatory evidence in this case. Athough the bulk of petitioner's urine sample was inadvertently destroyed, a small portion was left, and it was independently analyzed, as petitioner had requested. When petitioner failed to submit the information necessary for an independent analysis at a laboratory of his choice, the government notified him that the sample would be sent to the University of Utah laboratory, where it would be analyzed and consumed. Petitioner had an opportunity to object to that procedure, but he failed to do so. As the trial judge found, petitioner received exactly what he asked for: an independent analysis of his urine sample. Under these circumstances, petitioner cannot reasonably complain that he has been deprived of access to potentially exculpatory evidence.

In any event, there is no basis to suggest that petitioner's urine sample was exculpatory. As the Court explained in *California* v. *Trombetta*, 467 U.S. 479, 488-489 (1984) (footnote omitted), "[w]hatever duty the Constitution imposes on the [government] to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, * * * evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." The facts of this case clearly show that the destroyed urine sample was not material under *Trombetta*.

First, in light of the uniformly positive results from four different types of tests, petitioner's urine sample did not possess an apparent exculpatory value before it was inadvertently destroyed. The trial judge found that there was no reasonable basis for believing that any subsequent analysis of petitioner's urine sample by the Schoenfeld laboratory

would have resulted in any evidence favorable to the defense (R. 89). Second, the evidence at trial established that the type of test used at the University of Utah laboratory was of undisputed validity in the scientific community (R. 64, 156).[2] Thus, as in *Trombetta*, the test result was wholly reliable. Finally, the government introduced evidence regarding the calibration standards for the urinalysis equipment and the laboratory testing procedures (R. 155-170). For his part, petitioner sought to show through cross-examination that the analysis was not properly conducted (see R. 172-174). As in *Trombetta*, petitioner therefore had a reasonable opportunity to impeach the validity of the urinalysis test results.

Petitioner argues (Pet. 6-7) that the urinalysis test in this case was less reliable than the intoxilyzer test upheld in *Trombetta* because the urinalysis was performed at a later date and by persons other than those who took the sample. However, petitioner does not challenge the chain of custody of his urine sample that was established at his trial (R. 111-114), and he has failed to explain how the inadvertent destruction of his urine sample prevented him from exposing a weak link in that chain. Petitioner's suggestion that the urine specimen that was tested may not have been his own is beside the point. If an error was made in identifying petitioner's urine sample, petitioner's own independent test of that sample would not have corrected that error. Accordingly, the courts below correctly held that this case is controlled by *Trombetta*.[3]

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[2]That procedure is used by the National Institute on Drug Abuse as a reference procedure (R. 156).

[3]Petitioner also argues (Pet. 8) that his urinalysis test results were inadmissible under Article 46, UCMJ, 10 U.S.C. 846. However, the Court of Military Appeals held in *United States* v. *Kern*, 22 M.J. 49 (1986), that the *Trombetta* standard satisfies any special military due process requirements. Any alleged conflict between the Court of Military Appeals' decision here and in *Kern* is for that court to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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